APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-5026, 95-5048

JAMES BROWN,
Appellee/Cross-Appellant,

v.

SECRETARY OF THE ARMY,
Appellant/Cross-Appellee.

Argued Nov. 15, 1995

Decided March 12, 1996

Before: EDWARDS, Chief Judge, GINSBURG and HENDERSON, Circuit Judges.

GINSBURG, Circuit Judge:

In this litigation of Dickensian protraction, James E. Brown, a civilian employee of the U.S. Army, alleged and for the most part established that he was the victim of repeated employment discrimination based upon his race. In the last chapter Brown prevailed on the merits of a Title VII suit alleging that the Army discriminated against him in refusing to hire him into a GS-9 position; he received an award of back pay, placement in an appropriate position, and a permanent injunction against the Army's

engaging in any further discrimination against him. *See Brown v. Marsh*, 713 F.Supp. 20 (D.D.C.1989), *aff'd. sub nom. Brown v. Secretary of the Army*, 918 F.2d 214 (D.C.Cir. 1990). Today we write the epilogue to this nearly 20-year saga.

After resolving the merits of Brown's Title VII claim, the district court awarded Brown attorney's fees and costs pursuant to 42 U.S.C. § 2000e-5(k). The district court later awarded interest on those fees and costs, invoking the authority of § 114(2) of the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1079 (codified as an amendment to 42 U.S.C. § 2000e-16(d)). The Government now appeals the award of interest on the ground that the 1991 Act, which became effective while the case was pending, cannot be applied retroactively against the United States. In a cross-appeal Brown challenges the district court's use of the rate of interest on Treasury Bills, rather than the prime rate, to determine the amount of prejudgment interest he is due. As it turns out, we need not reach this issue.

We hold that sovereign immunity bars application of the interest provision retroactively to this case. A waiver of sovereign immunity must be strictly construed; it may not be applied retroactively unless the Congress clearly so intended. Wanting direction from the legislature that § 114(2) is to be applied retroactively, we vacate the district court's award of interest on Brown's attorney's fees.

I. Background

Brown's petition for attorney's fees, expenses, and interest was pending when the Congress passed the Civil Rights Act of 1991. By the terms of that Act, each provision was to "take effect upon enactment" (that is, on November 21, 1991) unless otherwise specifically provided. § 402(a), Pub.L. 102-166, 105 Stat. 1071, 1099 (1991).

In § 114(2) of the Act the Congress amended the portion of Title VII that applies to federal employees so as to provide that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 42 U.S.C. § 2000e-16(d). This provision was enacted in response to the decision in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), in which the Supreme Court had held that a party prevailing in a Title VII suit against the Government was not entitled to interest on attorney's fees because the provision permitting the award of the attorney's fees did not expressly waive sovereign immunity from such liability.

The district court awarded Brown attorney's fees and other expenses in August 1992, but it reserved the issue of interest on the fee award pending a final decision on the retroactivity of the 1991 Act in *Gersman v. Group Health Assn., Inc.*, 975 F.2d 886 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Following our decision in *Gersman* and the Supreme Court's subsequent decision in *Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), Brown renewed his request for interest on his award of attorney's fees. In *Landgraf* the Supreme Court reaffirmed its earlier holding in *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), that a court should generally apply the version of a statute, including any amendment, that is in effect at the time of its decision. Because the compensatory and punitive damage provisions of the 1991 Act would attach new substantive legal burdens to past conduct, however, the Court held that those provisions could not be applied retroactively. —— U.S. at ——, 114 S.Ct. at 1506.

Relying primarily upon *Landgraf*, the district court held that § 114(2) does apply retroactively to this case, entitling Brown to interest on his attorney's fees and expenses. *See Brown v. Marsh*, 868 F.Supp. 15 (D.D.C.

1994). The court reasoned that § 114(2) does not change any party's substantive rights because it "merely extends" to the Government the liability for interest on attorney's fees that private defendants already faced. *Id.* at 18. Moreover, the court said, the interest provision must be deemed collateral to the parties' substantive rights because the award of attorney's fees is itself "uniquely separable from the cause of action to be proved at trial." *Id.*

On appeal the Government argues, inter alia, that the interest provision of the 1991 Act is a waiver of sovereign immunity and therefore must be construed narrowly; because neither the text of the statute nor its legislative history indicates that the Congress intended it to apply retroactively, the provision cannot apply in this case. Brown retorts that a waiver of sovereign immunity must be construed narrowly only with respect to its scope; whether the waiver applies retroactively is a separate question that may be answered with reference to the principles of statutory construction laid down in *Bradley* and *Landgraf*.

The Government's sovereign immunity argument was raised for the first time on appeal. As Brown must concede, however, that is not a bar to our considering it. Whether the United States has consented to be sued "is the sort of jurisdictional question which may be raised at any time, either by the parties or by the court sua sponte." *Mellos v. Brownell,* 250 F.2d 35, 36 (D.C.Cir. 1957); *see United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 514, 60 S.Ct. 653, 657, 84 L.Ed. 894 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void").

Whether § 114(2) applies retroactively to this case is a question of law that was resolved by the district court upon a motion for summary judgment. Accordingly, we review the district court's decision *de novo. See Shields v. Eli Lilly & Co.,* 895 F.2d 1463, 1465-66 (D.C.Cir.1990).

II. Analysis

Nothing in either the text or the legislative history of the 1991 Civil Rights Act indicates that the Congress intended the entire Act to apply retroactively. *Landgraf*, —— U.S. at ——-——, 114 S.Ct. at 1493-96; *see also Gersman*, 975 F.2d at 888-92. Two provisions were explicitly made prospective only; the rest of the Act was to "take effect upon enactment." § 402(a), Pub.L. No. 102-166, 105 Stat. 1071, 1099 (1991). Absent any direction from the Congress, whether a particular provision of the Act applies retroactively to a case pending when the statute was enacted—that is, to a case arising from conduct that occurred before it was enacted—is a matter of statutory construction. *Cf. Landgraf*, —— U.S. at ——, 114 S.Ct. at 1496. The crucial issue in this case is which principle of statutory construction—the principle of *Shaw* and *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 103 S.Ct. 3274, 3277-78, 77 L.Ed.2d 938 (1983), applicable to waivers of sovereign immunity, or the principles of *Bradley* and *Landgraf*, which apply to retroactivity in general—should guide our interpretation of § 114(2).

A. Retroactivity under *Bradley* and *Landgraf*

As a general matter, in order to determine whether a statute has retroactive effect, the court first "must ask whether the new provision attached new legal consequences to events completed before its enactment." *Landgraf*, —— U.S. at ——, 114 S.Ct. at 1499. If not, then the court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016; *see United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801); *Gersman*, 975 F.2d at 893.

The principle that a court is to apply the law as it is at the time of decision was most fully explicated by the

Supreme Court in *Bradley*. The district court in that case, relying upon general equitable principles, had awarded attorney's fees and costs to the prevailing plaintiffs in a desegregation suit against a public school board. While the case was before the Fourth Circuit, the Congress enacted a statute expressly authorizing such awards. After vacating the district court's equitable award, the court of appeals held that the new statute could not be applied to attorney's fees for services rendered before the effective date of the statute. The Supreme Court reversed, holding that the plaintiffs were entitled to attorney's fees under the statute on the principle that, barring manifest injustice or statutory direction to the contrary, "a court is to apply the law in effect at the time it renders its decision." 416 U.S. at 711, 94 S.Ct. at 2016.

Twenty-five years later, in *Landgraf*, the Court made clear that the principle of *Bradley* is applicable only to nonsubstantive matters; it does not displace "the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." —— U.S. at ——, 114 S.Ct. at 1504. The new statute at issue in *Bradley*, the Court noted, affected only attorney's fee awards, which are "collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial," *id.* at ——, 114 S.Ct. at 1503; the statute did not impose a new substantive liability for pre-enactment conduct. From this distinction one might well infer that a statute authorizing the award of interest on attorney's fees would also fall within the play-it-as-it-lies principle of *Bradley*.

The statute at issue in *Bradley*, however, was not a waiver of the sovereign immunity of the United States; rather, it was an explicit statutory authorization for the award of attorney's fees in desegregation cases—a type of award that was available as an equitable matter before the enactment of the statute and was not barred by Eleventh Amendment immunity. 416 U.S. at 721, 94 S.Ct.

at 2021. As a result, the Supreme Court in *Bradley* had no occasion to advert to the special principle of statutory construction that it had previously made applicable to waivers of sovereign immunity. In this case, however, we must consult that principle.

B. Sovereign Immunity

A statute waiving the sovereign immunity of the United States must be construed strictly. *Shaw*, 478 U.S. at 318, 106 S.Ct. at 2963; *Ruckelshaus*, 463 U.S. at 685-86, 103 S.Ct. at 3277-78. Indeed, such a waiver is to be read no more broadly than its terms require. As the Supreme Court has more than once said with specific reference to a statute arguably waiving the immunity of the United States from the assessment of interest:

> There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Shaw, 478 U.S. at 318, 106 S.Ct. at 2963 (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947)). This rule of strict construction controls our analysis both in determining whether the United States has consented to be sued and in defining the scope of that consent. *See Nichols v. Pierce*, 740 F.2d 1249, 1257 (D.C.Cir.1984) ("The policies inherent in the rule requiring strict construction of waivers of sovereign immunity strongly suggest that any doubts about the scope of a waiver be resolved in favor of the narrower governmental liability"); *see also In re Nofziger*, 938 F.2d 1397, 1403 (D.C.Cir. 1991) (refusing to interpret waiver more broadly than

terms required and noting such waivers not subject to equitable expansion).

The courts have marshaled both historical and practical considerations in support of the doctrine of sovereign immunity and its appendant rule that waivers are to be construed narrowly. *See generally United States v. Lee*, 106 U.S. (16 Otto) 196, 27 L.Ed. 171 (1882). From an historical perspective, the doctrine rests upon the notion that "it would contradict the sovereignty of the king to allow him to be sued as of right in his own courts." *Hunt v. United States*, 636 F.2d 580, 583 (D.C.Cir. 1980). The sovereignty of the king has been succeeded by the sovereignty of the people, acting through their elected delegates, but the rule of strict construction still serves to insure that courts defer to the precise terms of their consent. In addition, as a practical matter:

> The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. . . . [The United States] cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.

The Siren, 74 U.S. (7 Wall.) 152, 154, 19 L.Ed. 129 (1868). The rule of strict construction is thus arguably necessary, as we once put it, to "protect[] the United States Treasury from potentially excessive liabilities which Congress did not anticipate." *Nichols*, 740 F.2d at 1255. While it may not be entirely clear why the Treasury of the United States is any more in need of protection from

"excessive liabilities" than is, say, General Motors, the rule of strict construction is itself clear. What is more, the rule is clearly understood to be the background against which the Congress acts when it waives sovereign immunity: we must presume that a Congress that intends to waive sovereign immunity is aware of the principles that will govern our reading of the waiver. Therefore, having said that we would take the legislature strictly at its word when it specifies whether and to what extent it waives sovereign immunity, we are bound to infer that it intended no more than it said.

C. Retroactivity of a Waiver of Sovereign Immunity

The present case poses the question: Does the rule of strict construction also govern our analysis of whether an undoubted waiver of sovereign immunity is to be given retroactive effect? Brown argues that the retroactivity of a waiver may be analyzed differently from other aspects of the scope of the waiver; once we have determined that the statute waives sovereign immunity from interest on attorney's fees, we may resolve the question of retroactivity with reference to the usual rules of statutory interpretation. In view of the rationale for the rule of strict construction, however, we can see no reason why it should not constrain us equally whether we plumb the depth or measure the breadth of a waiver. We run the same risk of imposing upon the public fisc an unanticipated and potentially excessive liability, whether we hold that a statute waives sovereign immunity from an element of damages not contemplated by the Congress or we apply the waiver over a period that the Congress did not envision. *See In re Jordan,* 745 F.2d 1574, 1576 (D.C.Cir. 1984) (holding attorney's fee amendment to Ethics Act not retroactive because "[w]aivers of sovereign immunity must be strictly construed. . . . [T]he fact that the amendment does not specifically exclude retroactive fee applications is of little importance to our construction of the

amendment"); *see also Woolf v. Bowles,* 57 F.3d 407, 410 (4th Cir.1995) ("*Shaw*'s reminder that waivers of interest immunity are to be strictly construed . . . provides further support for our conclusion [that under *Landgraf* § 114(2) of the 1991 Act cannot apply retroactively to authorize interest on back pay against the Government]"); *Huey v. Sullivan,* 971 F.2d 1362, 1365 (8th Cir.1992) (concluding that precursors to *Landgraf* bar retroactive application of § 114(2) in back pay cases, and noting that "the policy requiring that waivers of sovereign immunity be construed strictly in favor of the United States . . . makes a finding of no retroactivity even more compelling in this case"). But see *Campbell v. United States,* 809 F.2d 563, 577 (9th Cir.1987), discussed in Part II.C.2 below.

As they relate to the question whether a statute is retroactive, then, it would seem that the *Bradley* presumption and the rule of strict construction are antipodal. In the usual case—that is, the case in which no waiver of sovereign immunity is involved—*Bradley* requires the court to presume that the newly enacted provision is retroactive; only where manifest injustice would result, or where the Congress can be seen to have intended otherwise, is that presumption rebutted. In the special case, however, in which the newly enacted statute is a waiver of sovereign immunity, the rule of strict construction requires the opposite: the statute is to be construed no more broadly than is required by its terms.

We considered and rejected the application of *Bradley* to a case involving the waiver of sovereign immunity in *Nichols v. Pierce, supra.* That case concerned the waiver of immunity in the Equal Access to Justice Act for attorney's fees incurred by plaintiffs in cases "pending on, or commenced on or after" October 1, 1981. Pub.L.96-481, § 208, 94 Stat. 2321, 2330 (1980). The appellant had filed suit against the Government, and the substance of her claim had been fully litigated, long before that date.

The only aspect of the case still "pending" on October 1 was the plaintiff's appeal from the district court's order denying her the attorney's fees she sought under the Freedom of Information Act. We concluded that the EAJA did not apply to a case in which the only matter still pending concerned a petition for the award of attorney's fees. 740 F.2d at 1261. *Bradley* was "readily distinguishable": the United States was not the defendant in that case. *Id.* at 1258 (citing, inter alia, *Commissioners of Highways v. United States*, 684 F.2d 443, 443-45 (7th Cir.1982)); *accord Tongol v. Donovan*, 762 F.2d 727, 730-32 (9th Cir.1985) (following *Nichols*); *Commisioners of Highways*, 684 F.2d at 444 (reaching same result in case similar to *Nichols* and distinguishing *Bradley* on ground it "did not involve the issue of [the] sovereign immunity of the United States"); *Berman v. Schweiker*, 713 F.2d 1290, 1301 n. 28 (7th Cir.1983) ("Our observation in *Commissioners of Highways* that *Bradley* did not involve a sovereign immunity bar reflects a critical distinction between the two cases—one that required a different analysis of the retroactive fee issue . . ."); *Van Meter v. Barr*, 778 F.Supp. 83, 85-86 (D.D.C.1991); *cf. Edwards v. Lujan*, 40 F.3d 1152, 1153-54 & n. 1 (10th Cir.1994) (holding that § 114(2) does not apply retroactively to authorize interest on attorney's fees, based solely upon conclusory analogy to *Landgraf*). Because the Court in *Bradley* was not faced with a purported waiver of sovereign immunity, it interpreted the new statute broadly, without insisting upon the special rule requiring narrow construction of such a waiver. In this case as in *Nichols*, however, we must insist upon it.

We do well to remember that principles of statutory construction are not ends in themselves; they are the tools with which we discern the intent of a legislature that has not made its intent explicit. In this case, which must be viewed against the background of *Shaw*, the failure of the Congress to be explicit puts into stark relief the importance of applying the rule of strict construction to

each aspect of a waiver of sovereign immunity. Before the 1991 amendments, Title VII had provided simply that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . as part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k). This court held that because a court could award interest on the attorney's fee in a suit against a private employer, the just-quoted provision authorized the court equally in a case against the Government to award interest on the attorney's fee. The Supreme Court reversed, stating: "The statute, as well as its legislative history, contains no reference to interest. This congressional silence does not permit us to read the provision as the requisite waiver of the Government's immunity with respect to interest." 478 U.S. at 319, 106 S.Ct. at 2964. The Court reaffirmed the rule that waivers must be construed strictly in favor of the sovereign and emphasized that the "no-interest" rule—the historical rule that interest is a separate element of damages and may be recovered only against a party that has agreed to be liable therefor —provides "an added gloss of strictness" upon the rule of strict construction. *Id.* at 318, 106 S.Ct. at 2963; *see also Thompson v. Kennickell*, 797 F.2d 1015, 1017 (D.C.Cir. 1986) ("These principles of sovereign immunity take on added force when applied to claims of interest against the United States," citing "no-interest" rule). Shortly thereafter, the Congress responded to *Shaw* by adding to Title VII an express waiver of sovereign immunity from interest. Notwithstanding the Court's obvious intention to construe that waiver narrowly, however, the Congress said nothing to indicate that the provision should be applied retroactively. In these circumstances we cannot infer that the Congress anticipated a broader application of § 114(2) than is required by its terms.

1. Thompson v. Sawyer. Brown nonetheless contends that our own precedents require that we treat the question

of retroactivity by reference to the presumption laid out in *Bradley* and not as we treat other aspects of the scope of a waiver of sovereign immunity. In this connection Brown draws our attention to *Thompson v. Sawyer*, 678 F.2d 257 (D.C.Cir.1982), in which we held that certain statutory amendments making back pay and damages available to employees of the Government Printing Office could be applied retroactively to compensate employees for a period beginning before the effective date of the amendments. Indeed, quoting *Bradley*, we invoked the "basic rule" that "a court is to apply the law in effect at the time it renders its decision." 678 F.2d at 279. In an opinion by Judge Mikva before he said goodbye to footnotes, the court addressed the issue of sovereign immunity only in the margin, as follows:

> GPO contends that sovereign immunity insulates it from retrospective liability under both the Equal Pay Act and Title VII. Congress, however, waived sovereign immunity by authorizing suits against the federal government under the FLSA. *See United States v. Testan*, 424 U.S. 392 [96 S.Ct. 948, 47 L.Ed.2d 114] (1976). The question we face is whether Congress intended the statutory change, and hence the waiver, to have only prospective thrust.

Id. at 281 n. 23; *see also id.* at 289 n. 33.

In *Thompson* we were concerned with a rather narrow class of cases—those in which the conduct for which the Government is liable began before but continued beyond the effective date of the statute. *See Stoller v. Marsh*, 682 F.2d 971, 974 (D.C.Cir.1982) (citing *Thompson*). That is no doubt why, although we have often cited *Thompson*, it has never been to suggest in any way that a waiver of sovereign immunity may be applied retroactively if the Congress was silent upon that question. On the contrary, Judge Mikva later characterized *Thompson* as a case of the court following known congressional intent and holding "that the 1972 amendments . . . had simply extended

to federal employees a remedy for illegal discrimination, and that Congress had intended that remedy to be applied to the fullest extent." *McKenzie v. Sawyer,* 684 F.2d 62, 78 (D.C.Cir.1982); *cf. Cuneo v. Rumsfeld,* 553 F.2d 1360 (D.C.Cir.1977) (provision in FOIA authorizing awards of attorney's fees applied retroactively despite rule of strict construction because legislative history showed that Congress intended that existing body of law governing attorney's fees be used to determine whether award could be made against Government).

Moreover, after the Supreme Court had decided *Ruckelshaus* (about a year after our decision in *Thompson*), "reaffirming" that the rule of strict construction applies to waivers of sovereign immunity from attorney's fees and "cautioning courts against enlarging these waivers beyond the explicit statutory language," *Nichols,* 740 F.2d at 1255-56, we expressly relied upon the rule of strict construction in holding that a statute waiving sovereign immunity from attorney's fees could not be applied retroactively to cover fees incurred before the effective date of the statute because the Congress did not state or imply that it intended that result. *See In re Jordan,* 745 F.2d at 1576. We reached this holding without any suggestion that it was in tension with *Thompson.* We see no reason why *Thompson* should be of any more help to Brown today than it was to Hamilton Jordan in 1984.

2. *Hill v. United States.* Brown also relies upon *Hill v. United States,* 571 F.2d 1098, 1102 (1978), in which the Ninth Circuit held that § 702 of the Administrative Procedure Act applies retroactively to waive sovereign immunity from declaratory and affirmative relief arising out of conduct that occurred before the effective date of the 1976 amendments to the APA. The court in *Hill* analyzed the retroactivity of § 702 using the framework of *Bradley,* without reference to the rule of strict construction, that the provision was a waiver of sovereign immunity was considered only in the course of determining whether it

would be a manifest injustice to apply the statute retroactively. *Id.*

We note in this regard that the continued vitality of *Hill* as the law of the Ninth Circuit is very doubtful. The court adhered to *Hill* later the same year in *Rawlings v. Heckler*, 725 F.2d 1192, 1194-95 (9th Cir.1984) (holding attorney's fees incurred before effective date of EAJA recoverable in case pending on effective date, and rejecting Government's attempt to distinguish *Bradley* on sovereign immunity grounds). In the following year, however, the court limited *Rawlings* and distinguished it from a case raising the issue that we faced in *Nichols v. Pierce* —that is, whether a fee petition pending on the effective date of a statute authorizing an award of attorney's fees brings the case within the class of covered cases "pending on" the effective date. *See Tongol*, 762 F.2d at 730-32. The Ninth Circuit, following our holding and analysis in *Nichols*, distinguished *Bradley* because it did not involve a waiver of sovereign immunity and noted that *Nichols* "more closely reflect[ed] the approach mandated by latest teachings of the Supreme Court," namely the "principles of narrow construction." *Id.* at 732. Then, in a 1987 case involving the retroactive application of a statute that changed the index that determines (but did not necessarily raise) the rate of postjudgment interest payable by the Government, the court acknowledged the rule of strict construction in *Tongol* but then cited *Hill* and *Rawlings* with approval, stating that "[t]he principle of sovereign immunity does not require us to resolve all doubtful questions concerning the temporal applicability of a statute in the government's favor when the literal requirements of the statute are otherwise met." *Campbell*, 809 F.2d at 577. That case, however, was effectively overruled by the Supreme Court, which concluded, in a case against a private defendant in which sovereign immunity was not implicated at all, that the statute could not be applied retroactively to a judgment entered before the effective date of the statute. *See Kaiser Aluminum &*

Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990).

Finally, in considering whether to apply the provision at issue in this case to authorize interest on back pay in a case against the Government that was pending upon enactment of the statute, the Ninth Circuit discussed the retroactivity issue in *Bradley*-inspired terms without considering the rule of strict construction it had recognized in *Tongol* for cases against the sovereign *See Estate of Reynolds v. Martin*, 985 F.2d 470, 472-73 (9th Cir. 1993). Ultimately, however, the court concluded instead that the plain language of the 1991 Act indicates that the Congress intended that it be applied retroactively. *See id.* at 476. Inasmuch as the Supreme Court has since made clear that neither the language nor the legislative history shows an intent that the 1991 Act as a whole be applied retroactively, *see Landgraf*, —— U.S. at ——-——, 114 S.Ct. at 1493-96, it is unclear how the Ninth Circuit would now resolve the question whether § 114(2) in particular is retroactive. If it recalls the distinction it drew in *Tongol*—its last word on the subject apart from the decisions effectively overruled in *Kaiser Aluminum* or cast into doubt by *Landgraf*—then it will reach the same conclusion we do. *See also United States v. Matson Nav. Co. (The Louie III)*, 201 F.2d 610, 616 (9th Cir.1953) ("waiver of sovereign immunity creates a new cause of action which has no retroactive effect unless specifically granted"). In any event, the present state of the law on this issue in the Ninth Circuit is at best unclear and does not give us pause.

3. Other Cases. The remainder of the cases to which Brown refers are simply inapposite. In *Hutto v. Finney*, 437 U.S. 678, 693-98, 98 S.Ct. 2565, 2574-78, 57 L.Ed. 2d 522 (1978), the Supreme Court held that a statute authorizing fee-shifting in civil rights cases applied retroactively against the State of Arkansas, but only after concluding that the statute made fees part of the "costs"

awarded to a prevailing plaintiff, which had never been barred by the sovereign immunity of the States recognized in the Eleventh Amendment. In *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700 (3d Cir. 1983), the Third Circuit did not even mention sovereign immunity in concluding that the statute in question applied retroactively against the United States. And both the Seventh Circuit in *Adams v. Brinegar*, 521 F.2d 129 (7th Cir.1975), and this court in *Womack v. Lynn*, 504 F.2d 267 (D.C.Cir.1974), held that a statute authorizing judicial review of a federal employee's administrative claim of employment discrimination applied retroactively because the statute provided merely that the employee would have access to a judicial forum and did not create a new substantive liability in derogation of sovereign immunity. None of these cases supports the argument that we should resolve the question whether the waiver of sovereign immunity in this case may be applied retroactively by consulting the principle of *Bradley* rather than the rule of strict construction.

III. Conclusion

Despite the Supreme Court's reaffirmation in *Ruckelshaus* and in *Shaw* that waivers of sovereign immunity must be construed narrowly, there remains considerable confusion about the relationship between that special rule and the principles governing the retroactivity of statutes in general. In addition to the district court in this case, the Fourth, Eighth, and Tenth Circuits have considered whether a waiver of sovereign immunity is retroactive as though the question were to be answered in part by reference to the principles in *Bradley* and *Landgraf*. *See Woolf*, 57 F.3d at 410; *Huey*, 971 F.2d at 1365-66; *Edwards*, 40 F.3d at 1153-54 & n. 1. In this case we face yet again a party arguing that we should apply the analysis in *Bradley* to a case involving a waiver of sovereign immunity. Until the Supreme Court changes its position, however,

we believe that the rule of strict construction displaces the *Bradley* analysis when the question is whether a waiver of sovereign immunity is to be applied retroactively.

Section 114(2) of the 1991 Act waives sovereign immunity with respect to interest on attorney's fees awarded under Title VII. In the case at hand, the litigation on the merits of Brown's claims was completed and the attorney's fee incurred before the statute became effective. Therefore, to apply § 114(2) retroactively in this case would be to impose upon the United States a liability to which it has not explicitly consented. The order of the district court awarding interest on Brown's attorney's fees and expenses is accordingly

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 80-1169 (CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH, JR., Secretary of the Army,

Defendant.

Nov. 21, 1994

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

In 1991, Congress amended the Civil Rights Act of 1964 ("The 1964 Act"), as amended in March, 1972. 42 U.S.C. § 2000a *et seq.* The Civil Rights Act of 1991 ("The 1991 Act") provides in Section 114 that:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and *the same interest to compensate for delay in payment shall be available* as in cases involving nonpublic parties.

42 U.S.C. § 2000e-16(d) ("Section 114") (emphasis added). Section 114 entitles a prevailing party in a Title VII action to an award of interest on previously awarded attorney's fees and expenses.

The question presented in this case is whether the above statute, which provides for interest on attorney's fees and expenses, applies to a case that was pending at the time the statute was enacted.

Upon careful consideration of the pleadings, oral argument, and the applicable law, the Court holds that Section 114 applies to the case at bar, entitling the Plaintiff to interest on his attorney's fees and expenses. In addition, the Court holds that interest shall be calculated in accordance with the judgment rate of interest prescribed in 28 U.S.C. § 1961.

FACTS

On August 20, 1992, the Court awarded attorney's fees and expenses to the Plaintiff as a prevailing party in a Title VII action. However, the Court reserved the issue of whether interest on those fees is awardable pending resolution by the District of Columbia Circuit of the applicability of the Civil Rights Act of 1991 to pending cases.

In late 1994, the Plaintiff filed an application for interest on his attorney's fees in light of this Circuit's decision in *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994), and the Supreme Court's decision in *Landgraf v. USI Film Prods.*, —— U.S. ——, ——-——, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994).

In response, the Government agreed to pay the Plaintiff interest on his attorney's fees and expenses incurred after the enactment of Section 114 of the Civil Rights Act of 1991. However, the Government contended that the Plaintiff is not entitled to any interest on fees prior to the enactment of Section 114. According to the Government,

there is a presumption against the retroactive application of a statute whenever applying the statute would affect the parties' substantive rights. *See e.g., Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 471-72, 102 L.Ed.2d 493 (1988). The Government contends that the presumption against retroactivity applies in this case because awarding interest on attorney's fees is a compensatory damage award and, therefore, would affect their substantive rights. Nevertheless, even if the Plaintiff were entitled to interest, the Government argues, the appropriate rate of interest is the judgment rate of interest prescribed in 28 U.S.C. § 1961.

The Plaintiff, in response, contends that the presumption against retroactive application of a statute does not arise when the application of a statute is merely collateral. In such cases, a court must apply the law that exists at the time that it renders its decision. *See e.g., Bradley v. Richmond School Bd.,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). According to the Plaintiff, awarding interest on attorney's fees in a case that was pending when Section 114 was enacted is purely collateral and, therefore, does not affect the substantive rights of the parties. Consequently, the Plaintiff argues that he is entitled to interest on his attorney's fees and that the appropriate rate of interest is the prime rate.

Upon review of the pleadings, oral argument, and applicable law, the Court finds that Section 114 of the Act allowing for interest on attorney's fees does not affect the parties' substantive rights. Therefore, the presumption against retroactive application of a statute does not apply. Instead, the Court must apply the law that exists at the time it renders its decision. Since Section 114 is currently effective, the Court finds that the Plaintiff is entitled to an award of interest on his attorney's fees and costs. In addition, in view of the substantial case law applying the judgment rate of interest instead of the prime rate of interest to an award of attorney's fees, the appropriate

rate of interest is the judgment rate set forth in 28 U.S.C. § 1961.

DISCUSSION

I. *THE COURT FINDS THAT THE PLAINTIFF IS ENTITLED TO INTEREST ON HIS ATTORNEY'S FEES AND COSTS BECAUSE APPLYING SECTION 114 RETROACTIVELY ONLY AFFECTS THE COLLATERAL RIGHTS OF THE PARTIES.*

Section 114 of the Civil Rights Act of 1991 entitles a prevailing party to interest on attorney's fees from a Government party. 42 U.S.C. § 2000e-16(d) ("Section 114"). At the time that Section 114 took effect in November of 1991, the instant action was still pending before this Court.

To decide if Section 114 applies retroactively, the Court must first look to the language of the statute itself. *E.g., Planned Parenthood Fed'n of Am. v. Heckler,* 712 F.2d 650, 655 (D.C.Cir.1983) (citing *CPS v. GTE Sylvania, Inc.,* 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). However, since the statute is silent with respect to whether Section 114 applies retroactively or not, the Court must look to the relevant case law.

According to the case law, if applying a statute retroactively would affect the parties' substantive rights, then a presumption against retroactive application of a statute arises. *Landgraf v. USI Film Prods.,* —— U.S. ——, ——, ——, 114 S.Ct. 1483, 1499, 1502, 128 L.Ed.2d 229 (1994); *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 471-72, 102 L.Ed.2d 493 (1988); *Gersman v. Group Health Ass'n, Inc.,* 975 F.2d 886, 898 (D.C.Cir.1992), *cert. denied,* —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Based on that presumption, a statute will not be applied retroactively.

In contrast, if applying a statute retroactively would only affect the parties' collateral rights, then a court is to apply the law that exists at the time it renders its decisions. *Landgraf v. USI Film Prods.*, —— U.S. ——, ——-——, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994); *see Bradley v. Richmond School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed.49 (1801); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 898-99 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Accordingly, a statute that does not affect the substantive rights of the parties will be applied retroactively.

In applying the foregoing analysis to the case at bar, the Court must decide if awarding the Plaintiff interest on his attorney's fees affects the parties' substantive rights. For if the award of interest on attorney's fees affects a substantive right, the traditional presumption against retroactive application of a statute applies. Conversely, if the award of interest on attorney's fees is a collateral or secondary matter, the Court is to apply the law that exists at the time it renders its decision. Upon examining the nature of an award of interest on attorney's fees, the Court holds that interest on attorney's fees are merely collateral or secondary, and therefore, are awardable in this case for three reasons.

First, prior to the enactment of Section 114, plaintiffs in a Title VII action were entitled to interest on attorney's fees in private-sector cases. *See*, 42 U.S.C. § 2000e-5(k) (1982); *e.g., Rodgers v. United States*, 332 U.S. 371, 373-74, 68 S.Ct. 5, 6-7, 92 L.Ed. 3 (1947); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 764 & n. 6 (7th Cir.1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428, 77 L.Ed.2d 1315 (1983). The enactment of Section 114 merely extends an award of interest to cases involving the Gov-

ernment. Consequently, as a mere "extension" of prior law, Section 114 does not substantively change the parties' rights.

Second, the Supreme Court has held that since awarding attorney's fees is uniquely separable from the cause of action to be proved at trial, awarding such fees is a collateral issue. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-52, 102 S.Ct. 1162, 1166-67, 71 L.Ed.2d 325 (1982). It follows from *White* that a statute such as Section 114, that awards interests on those fees must also be a collateral issue.

Third, the Government can not contend that their substantive rights will be affected because prior to the enactment of Section 114, parties were already entitled to attorney's fees in private-sector cases. Section 114 merely added that interest on those fees shall also be payable in public-sector cases. Thus, Section 114 does not add a substantive obligation on the part of the Government. Moreover, Section 114 of the 1991 Act waives sovereign immunity with respect to interest.

Based on the foregoing, since an award of interest on attorney's fees is a collateral issue, Section 114 shall apply to this case and, therefore, the Plaintiff is entitled to interest on his attorney's fees.

II. *THE PLAINTIFF'S INTEREST ON ATTORNEY'S FEES SHALL BE CALCULATED BASED ON THE UNITED STATES TREASURY BILL RATE BECAUSE OF THE SUBSTANTIAL CASE LAW THAT APPLIES SECTION 1961(a) TO JUDGMENTS AWARDING ATTORNEY'S FEES.*

Since the Court has found that the Plaintiff is entitled to interest on attorney's fees, the Court must now decide the appropriate interest rate. According to the Plaintiff, the calculation should be based on the prime rate of interest for each year they were entitled to fees. (Pl's.

Mot. for Interest on Attorney's Fees at 9.) In his argument, Plaintiff cites to several cases that apply the prime rate of interest. *Id.* (citing *e.g., Alberti v. Klevenhagen,* 896 F.2d 927, 938 (5th Cir.1990) (prime rate of interest is applied to compensate counsel for delay in payment).

However, the fatal flaw in Plaintiff's argument is that those decisions used the prime rate when the payment of attorney's fees—not interest—has been delayed. In contrast, the Plaintiff, here, has already received attorney's fees. At issue is only the payment of interest.

In calculating the interest due the Plaintiff, the Court is, instead, persuaded that the statute providing for the payment of interest on a judgment shall apply. The statute, 28 U.S.C. § 1961(a), calculates interest due upon a judgment based upon the United States Treasury Bill rate. The statute provides:

> Interest shall be allowed on any money judgment in a civil case covered in a district court. . . . Such interest shall be calculated . . . at a rate equal to the coupon yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

28 U.S.C. § 1961(a) ("Section 1961"). Since it is well-settled that Section 1961 is used to calculate the interest due on a judgment awarding attorney's fees, *see e.g., Mid-America Fed. Savs. & Loan Ass'n v. Shearson/Am. Express, Inc.,* 962 F.2d 1470, 1475-77 (10th Cir. 1992); *cf. Oklahoma Aerotronics, Inc. v. United States,* 943 F.2d 1344, 1349 (D.C.Cir.1991), the Court shall apply the United States Treasury Bill rate of interest in determining the amount of interest due the Plaintiff.

In response to the Court's request, the Defendant computed the interest that would be due the Plaintiff for the

period ending November 21, 1991 in accordance with 28 U.S.C. § 1961(a). According to those calculations, the total amount of interest due is $21,952.68. The portion due Reed, Smith is $13,468.94 and the portion due the Lawyers' Commitee is $8,483.74.

Therefore, based on the Defendant's calculations, the Court shall award Plaintiff interest on his attorney's fees in the amount of $21,952.68.

CONCLUSION

For the foregoing reasons the Court shall award the Plaintiff interest on his attorney's fees based on the United States Treasury Bill rate of interest. The Court shall enter an Order of even date herewith.

APPENDIX C

[Filed Nov. 21, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1169
(CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH, JR.,
Secretary of the Army,

Defendant.

Order

Upon careful consideration of the parties' memoranda, the applicable law, and for the reasons articulated in the Opinion of the Court of even date herewith, it is, by the Court, this 21 day of November, 1994

ORDERED that the Plaintiff's Motion for Interest on Attorney's Fees and Costs shall be, and hereby is, GRANTED, in part; and it is

FURTHER ORDERED that in accordance with the preceding ordered paragraph, the Plaintiff shall be, and hereby is, awarded interest on his attorney's fees and costs in the amount of $21,952.68.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed Nov. 23, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1169
(CRR)

JAMES E. BROWN,
Plaintiff,

v.

JOHN O. MARSH, JR.,
Secretary of the Army,
Defendant.

ORDER

The Court isued an Order and Opinion in the above-captioned case on November 21, 1994. On page one under the "Appearances" section, Clifford E. Greenblatt is listed with the Defendant as an Assistant United States Attorney. However, Clifford E. Greenblatt should not be listed with the Defendant at all. Instead, Mr. Greenblatt should be listed with the Plaintiff as a member of Steptoe & Johnson and should be stricken from the Defendant appearance. The corrected Plaintiff appearance should read as follows:

> FOR THE PLAINTIFF: Roger E. Warin of Steptoe & Johnson, Washington, D.C. argued the case for the Plaintiff. With him on the briefs were Clifford E. Greenblatt and Charles F. Monk, Jr. of Steptoe & Johnson, Washington, D.C., Joseph M. Sellers of Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C., and John R. Erickson of Reed, Smith, Shaw & McClay, McLean, Va.

This change is not intended to change the meaning or substance of the Opinion or Order.

Accordingly, it is, by this Court, this 23 day of November, 1994.

ORDERED that page one, under the Appearances section, of the Court's Opinion issued in the above-captioned case on November 21, 1994, shall be, and hereby is, amended as explained above.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-5026, 95-5048

JAMES BROWN,
Appellee/Cross Appellant,

v.

SECRETARY OF THE ARMY,
Appellant/Cross-Appellee.

June 14, 1996

PETITION FOR REHEARING

Opinion for the court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge.

In his petition for rehearing, Brown argues that our prior decision in this case, in which we held that the provision of the 1991 Civil Rights Act that waives sovereign immunity from interest on attorney's fees is not to be applied retroactively, *see* 78 F.3d 645 (D.C.Cir.1996), is inconsistent with the Supreme Court's decision in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Brown did not mention this case either in oral argument or in the letter he sub-

mitted listing the authorities upon which he had relied; we entertain Brown's present objection, however, because his reliance upon *Irwin* does not present a new (and therefore untimely) argument. Brown invokes *Irwin* merely as additional support for his proposition that the principle of strict construction applies only to the initial question whether the Congress has waived sovereign immunity, after which a court should consult ordinary principles of statutory construction in order to determine the scope of that waiver. We see no conflict between *Irwin* and our decision in this case.

The issue in *Irwin* was whether the doctrine of equitable tolling applies to the statutory filing deadline set out in Title VII for cases against the federal government. Irwin had filed a discrimination complaint with the EEOC, which dismissed the complaint and sent right-to-sue letters to Irwin and to his counsel. The letter to the attorney arrived at his office two weeks before the other copy reached Irwin, but the attorney was out of the country then and did not become aware of the letter until some time later. Irwin filed a complaint in district court 29 days after he had received the letter but 44 days after the letter was received at the attorney's office. The Fifth Circuit held that the 30-day filing limit provided in Title VII begins to run when notice of the EEOC's action is delivered to the office of claimant's counsel or to the claimant, whichever is first, 874 F.2d 1092, 1094 (1989); therefore, Irwin's claim was time-barred. Moreover, the court concluded, the statutory time limit in Title VII operates as an absolute jurisdictional limit, so that Irwin could not invoke equitable tolling to excuse his late filing. *Id.* at 1093, 1095.

The Supreme Court agreed with the Fifth Circuit's conclusion that the statute of limitations begins to run when notice of the EEOC action is delivered to the claimant or the claimant's counsel, whichever is first. With respect to the issue of equitable tolling, the Court observed

that a waiver of sovereign immunity "must be strictly construed," 498 U.S. at 94, 111 S.Ct. at 456, but nonetheless held that equitable tolling could be applied in Title VII cases against the federal government:

> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation.

Id. at 95, 111 S.Ct. at 457. The Court ultimately affirmed the judgment of the Fifth Circuit because, on the particular facts of the case, equitable tolling was of no help to Irwin. *Id.* at 96, 111 S.Ct. at 457-58.

Brown argues that under *Irwin,* once we determined that the statute waives sovereign immunity from interest on attorney's fees, we should have resolved the question of retroactivity by applying the usual rules of statutory interpretation. His argument does not account, however, for a significant distinction between the provisions at issue in the instant case and those at issue in *Irwin.* In the latter case the Supreme Court addressed the question whether the statutory time limit for filing a Title VII claim against the federal government is subject to equitable tolling.

A clause that supplies a statutory time limit is not itself a waiver of sovereign immunity; it is rather a condition subsequent that the Congress may place upon the waiver. In Title VII the condition is that the complaint be filed within thirty days of the date when the plaintiff receives notice of final action taken by the EEOC. *Id.* at 94, 111 S.Ct. at 456-57. The waiver of sovereign immunity in Title VII clearly applied to the conduct and to the parties in *Irwin*; the issue was whether the plaintiff had satisfied

the condition subsequent. In this case, the issue is whether the waiver of sovereign immunity for interest applies in the first place. Accordingly, the statutory construction issue here arises in the first step of the inquiry described in *Irwin*—that is, whether the Congress waived sovereign immunity. The Supreme Court's application of the equitable tolling doctrine to the time limit in Title VII is therefore not at all inconsistent with this court's holding that a waiver of sovereign immunity is not to be applied retroactively unless the Congress so states.

Moreover, in *Irwin* the Court pointed out that the application of equitable tolling to the statutory time limit would "amount[] to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent. . . ." *Id.* at 95, 111 S.Ct. at 457. Here, in sharp contrast, application of the standard retroactivity analysis is not likely to reflect "a realistic assessment of legislative intent." Recall that the Congress enacted the interest provision in direct response to the Supreme Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (holding that 42 U.S.C. § 2000e-5(k), making the United States "liable for costs the same as a private person," should not be read to authorize interest on attorney's fees even though such interest was available against a private party) In *Shaw* the Court had reaffirmed the rule of strict construction and indicated that "[t]he no-interest rule provides an added gloss of strictness" upon that rule. 478 U.S. at 318, 106 S.Ct. at 2963. As we explained in our prior opinion, against the background of *Shaw*, in which the Congress was specifically advised that this type of waiver of sovereign immunity would be read narrowly, we see no reason to think that the Congress intended to waive sovereign immunity any more broadly than it provided by the terms of the amendment it enacted.

The petition for rehearing is therefore

Denied.

APPENDIX F

[Filed Jun. 14, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
80cv01169

No. 95-5026

JAMES BROWN,

Appellee,

v.

SECRETARY OF THE ARMY,

Appellant.

Consolidated with 95-5048

BEFORE: Edwards, Chief Judge, Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of Appellee/Cross-Apellant and of the response thereto, it is

ORDERED that the petition be denied, as is more fully set forth in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: June 14, 1996

Opinion on rehearing filed by Circuit Judge Ginsburg.

APPENDIX G

[Filed Jun. 14, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1995
80cv01169

No. 95-5026

JAMES BROWN,

Appellee,

v.

SECRETARY OF THE ARMY,

Appellant.

Consolidated with 95-5048

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the Suggestion for Rehearing *In Banc*, of Appellee/CrossAppellant, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this order.